IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 58 OF 2004

State ... Appellant

versus

Vipul Dhruva, Bordem,
Bicholim Goa. ... Respondent

Ms. W. Coutinho, Public Prosecutor for the State.

Mr. Arun Bras De Sa, Advocate for the Respondent.

CORAM : N. A. BRITTO, J.

DATE : 13TH & 22ND SEPTEMBER,2006

ORAL JUDGMENT

This is State's appeal against the acquittal of the accused under Sections 454, 380 r/w 511 I.P.C., by Order dated 30-4-2004 of the learned J.M.F.C., Bicholim.

2. The accused was the Manager of a factory owned by M/s. Arihant Distillery Pvt. Ltd. The factory of the said M/s. Arihant Distillery Pvt. Ltd. was sealed by the Superintendent of Excise on 30-6-2001, and, subsequently the Commissioner of

Excise passed an Order dated 11-10-2001 under Section 38 of the Goa Excise Duty Act, 1964(Act, for short). The said Order of the Commissioner of Excise dated 11-10-2001 shows that the licensee i.e. the said M/s. Arihant Distillery Pvt. Ltd. had violated the conditions of the license and the bond and therefore in terms of Section 38 of the Act a penalty of Rs.2,00,000/- was imposed on the said licensee. A fine of Rs.80,000/- was also imposed on the licensee and the said licensee was required to pay the said fine within a period of 15 days. The license was cancelled with immediate effect. The machinery and the apparatus along with the finished goods and alcohol lying in the licensed premises were confiscated in terms of Section 37 of the said Act. It was also stipulated that in case the licensee failed to make the payment of penalty, fine and sums due to the Government within the stipulated time, the department was required to proceed in terms of Section 20 of the said Act for the recovery of the sums due to the Government. The Commissioner of Excise, came to the conclusion, as can be seen from the said Order, that duplicate brands of well known liquor were being manufactured of well known licensed manufacturers illegally, unauthorizedly, and

clandestinely by the accused, the Manager cum working director and sold throughout Goa State thereby posing threat to health, besides evading excise duty. An appeal against the said Order is stated to be still pending.

3. The Excise Inspector of Bicholim on or about 20-7-2002 filed a complaint to the Police Inspector, Bicholim Police Station alleging that on 19-7-2002 at about 3 p.m. while he had gone for routine checking near the location of the said M/s Arihant Distillery Pvt. Ltd. he had heard strong sounds coming from the said factory and on checking the premises he had found some persons inside the factory trying to remove one metallic tank and in the meantime the accused who claimed to be the factory Manager came to the spot and after recognizing him and other excise personnel ran away, and when he inquired from the labourers, he was told that they were engaged by the accused to shift the tank from the factory premises worth approximately Rs.27,000/-. In the said complaint he also stated that the factory in question was sealed by their Department on 30-6-2001 as the factory was involved in the manufacture of duplicate liquor. He also mentioned in the complaint that the

license of the unit was cancelled and the factory premises were confiscated along with the liquor goods/alcohol in favour of the Government. He also stated that the management had filed an appeal against the said Order of the Commissioner of Excise, to the Chief Secretary, Panaji but the same was pending. He stated that the keys of sealing of bottling/blending and bonded warehouses were possessed by their Office and therefore the management of the unit or its agent could not enter or conduct any activity without the consent of the Excise Department.

4. As a result of the said complaint, the case was invested by P.S.I. Shetgaonkar/PW6 of Bicholim Police Station and the accused prosecuted under Sections 454, 380 r/w 511 I.P.C. Charge having been framed under the said Sections, the accused pleaded not guilty. The case of the accused, as can be seen from the statement of the accused recorded under Section 313 of the Code(Code of Criminal Procedure, 1973) is that he had challenged the said order of the Chief Secretary, Panaji and during the pendency of the appeal the Chief Secretary had brought to the notice of the Excise Inspector, Bicholim many irregularities committed by him during the inspection of the

factory and as such the complainant was angry and that could be the reason for filing a false case against him. The accused did not produce any document to support the said statement. The accused also did not state whether the Chief Secretary had stayed the said Order.

5. In the trial which followed, the prosecution examined 6 witnesses including P.S.I. Shetgaonkar/PW6 who investigated the case.

6. The learned J.M.F.C. whilst acquitting the accused observed that the witnesses who were the labourers were not knowing the accused prior to the incident and therefore it was incumbent upon the Investigating Officer to have conducted an identification parade which was not conducted in this case. The learned J.M.F.C. entirely lost sight of the fact that the accused who had gone to the market to engage labourers, particularly Kasim/PW3 and Bhimrao/PW4 had engaged them and had negotiated their wages to be paid to them at Rs.1,200/- and not only that the said labourers had again met the accused at the factory premises wherein they had entered with a view to

remove the said tank and in such a situation there was absolutely no necessity of a prior test identification parade having been conducted by the Investigating Officer. The Investigating Officer had stated that no test identification parade was held because the name of the accused was specifically mentioned in the complaint filed by the Excise Inspector/PW1. It is not that in each and every case that an identification parade is required to be held. What is important is not the identification of an accused at the test identification parade but the identification of the accused before the Court and that is what is the substantive evidence. In this context, reference to the case of **Malkhansingh and others** v. **State of M.P.** ((2003) 5 SCC 746) would not be out of context wherein the Apex Court has stated that the rule of having a prior test identification is a rule of mere prudence and is subject to exceptions when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. It is no doubt true that much evidentiary value cannot be attached to the identification of the accused in Court where identifying witness is a total stranger who on just a fleeting glimpse of the person identified or who

had no particular reason to remember the person concerned, if the identification is made for the first time in Court. In the case at hand, there was absolutely no necessity of having a test identification parade for the prosecution witnesses particularly the Excise Inspector/PW1 as well as Kasim/PW3 and Bhimrao/PW4 who had seen the accused for sufficiently long period of time. It is not in each and every case that a prior test identification parade is required to be held when a witness comes across an accused for the first time and that depends on the facts and circumstances of each case. The learned J.M.F.C. wrongly observed that the panchanama as regards the tank was not conducted by the Investigating Officer when such a panchanama was not only conducted but was produced and in support of which prosecution had examined Rama Mandrekar/PW2 and Krishna Lad/PW5 and although the latter was cross-examined by the prosecution, he had entirely supported the said panchanama. If at all the tank was not seized and brought before the Court because it was heavy as stated by PSI Shetgaonkar/PW6 whose statement ought to have been accepted. The very fact that about 6 to 7 people were required to move the same also supported his statement.

A piece of zinc pipe and the crow bar(parai) were attached through the said panchanama and brought before the Court. If at all the said tank was not brought before the Court it was because it was heavy, as stated by PSI Shetgaonkar/PW6.

7. The Excise Inspector/Shri Mahale/PW1 in his evidence before the Court had stated that the entire factory was under the control of the Excise Department and on 19-7-2002 at about 3.00 p.m. when he had gone for routine checking and had reached near the said factory he had heard some sound coming from inside the factory and on checking he found 7 persons talking in Kannada, inside the said factory and at that time he was accompanied by Suresh Sakhalkar. He stated that he requested the said Suresh to come towards the back side door of the factory and check the position as the front door of the factory was locked from inside and then he tried to contact the Excise Station at Bicholim to depute extra guards and also contacted the Assistant Commissioner at Panaji for further advice and in the meantime the accused came near the factory and stated that he was not involved in the commission of the offence and that he kept the said guard Suresh Sakhalkar near

the rear side door and instructed him not to allow any person to come outside the factory and in the meantime the accused disappeared from the spot when the Assistant Commissioner came to the spot. He stated that the said tank was supposed to be in the bonded warehouse but was found outside the bonded warehouse and it was removed in order to be taken out from the factory premises without their consent. He stated that till date (i.e. 22-4-2003) they were in possession of the liquor and raw material existing in the bonded warehouse of the factory premises. He further stated that on 30-6-2001 the premises of the factory were sealed by the Superintendent of Excise and there was a lock put by the Superintendent of Excise and that the said lock belonged to the Superintendent of Excise and one key of the said lock was handed over to him which he was still having. In cross-examination he stated that the labourers who were there had informed him that they were hired by the accused. He produced the order of his posting as Excise Inspector dated 16-8-2001, the order of the Commissioner dated 11-10-2001, the panchanama dated 30-6-2001 by which the factory was sealed, amongst other documents. The complaint dated 20-7-2002 was also produced.

8. Rama/PW2 was a panch witness. He stated that he saw a door of the factory opened towards the rear side of the factory and further stated that there was a tank, half outside the door and half inside the factory, on the rear side and below the tank one iron pipe and one lever were found which he identified before the Court as MO1 and MO2. In cross-examination he stated that the said MO's were below the tank and they were not seen. Krishna Lad/PW5 stated that on 20-7-2002 he acted as panch witness and he was shown one tank, two pipes and liquor bottles. He stated that the two pipes which were below the tank were removed in his presence and attached under the panchanama. He stated that the accused was not present when the said panchanama was drawn. He stated that the tank was 4 meters long and 2 meters in height. He stated that the complainant had told them that the said tank was supposed to be inside the bonded warehouse. He also admitted that the tank was placed on the way, on the passage outside the original place where it was seen and that the culprits were trying to shift the said tank to commit the theft. He identified the crow bar/MO1 and the zinc pipe/MO2 when shown to him. In

further cross-examination he admitted that the Police had obtained 3 signatures, 2 on both the MO's and 1 on the panchanama.

9. Kasim/PW3 stated that he was called by the accused along with 6 more labourers whose names he mentioned including that of Bhimrao/PW4. He further stated that they were taken to the factory and were asked to remove a metallic tank from the said factory which they removed with the help of iron bar and pipe. He further stated that when they reached near the factory there was a lock to the door of the factory and it was the accused who took them inside the factory and they were told by the accused to remove the metallic tank from the said factory. He further stated that they were about to remove the said tank outside the factory and at that time the Excise Inspector from Bicholim came to the factory and by that time the accused had already ran away. He also stated that the accused had informed them that he is the owner of the said factory. He stated that the accused had not paid the money to them which was agreed to be paid of Rs.1,200/- as wages. In cross-examination he admitted that he was in police custody for two days, having been arrested

on suspicion. He also stated that when they had gone to the door, the said door was sealed and after the accused opened the door then only they entered the factory.

10. Bhimrao/PW4 also stated that on 19-7-2002 they were sitting in the market at Bicholim waiting for customers and there were seven of them whose names he mentioned and which includes Kasim/PW3. He stated that when they were sitting and waiting for the customers the accused came to them and told them that one tank was required to be removed from the factory and they went on foot and upon reaching the factory, the accused opened the rear door of the factory. He stated that he had not seen how the accused opened the latch of the closed door. He stated that in the said factory they saw metallic tank of a height of about 4 meters and width of 2 meters and they removed the said tank with the help of crow bar(parai)/MO2 and an iron pipe/MO1 and while in the process of removing the said tank, the Excise Inspector reached the factory and then they were stopped from removing the said tank outside the factory and at that time the accused was inside the factory but in the meantime the accused escaped from the scene of offence and

they were all taken to the Police Station by the Excise Inspector. He stated that he did not know to whom the said factory belonged to. He stated that they were informed that the factory was belonging to the accused who told them that he is the owner of the said factory and he had disclosed his name as Vipul. In cross-examination he stated that they had seen the accused for the first time in the market when the accused came to call them and for the second time before the Court(i.e. on 25-3-2004 when the deposition of the witness was recorded). He stated that the accused was standing outside the factory when they were in the process of removing the said tank and the Excise Inspector had entered the factory. He further stated that he came to know the name of the accused at the Police Station at the time of recording his statement.

11. Mr. Bras De Sa, the learned Counsel on behalf of the accused, submits that the Excise Inspector/PW1 did not produce any document in support of his assertion that on 30-6-2001 the premises of the factory were sealed by the Superintendent of Excise. It is certainly not the case of the accused either in cross-examination or in his statement recorded under Section 313 of

the Code that as on 19-7-2002 he as the Manager had access to the said factory or was in possession of the same. I have absolutely no hesitation to accept the statement of the Excise Inspector/PW1 that the premises of the said factory were sealed by the Superintendent of Excise on 30-6-2001 and since then the factory was in possession of and under the control of the department of Excise of the Government of Goa. The panchanama dated 30-6-2001-Exh.PW1/C further supports the statement of the Excise Inspector/PW1. The said panchanama shows that the Superintendent of Excise had put their own locks, details of which are mentioned on the said panchanama and had also sealed the same. This is further corroborated by Kasim/PW3 when he stated that when they went to the door, the door was sealed and it is the accused who opened the said door. Mr. De Sa has next submitted that there was a delay in lodging the FIR by the Excise Inspector/PW1. There is no doubt that the incident took place at about 3.00 p.m. on 19-7-2002 and the FIR-Exh.PW1/H came to be filed on the next day, and, as stated by Shetgaonkar/PW6 at about 11.00 a.m. In other words, it was filed within less than 24 hours. There was not a single question in cross-examination to the Excise Inspector/PW1 as regards late

lodging of the said FIR but PSI Shetgaonkar/PW6 when questioned about that aspect, stated that the delay in lodging of the complaint/FIR was because the complainant/PW1 had to wait for the permission of his superior. It is to be noted that the FIR in this case came from none other than the Inspector/PW1 himself. The object of insisting upon prompt lodging of the report to the Police in respect of the commission of the offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report can often result in emblishment which is an afterthought on account of delay. In the case at hand, there is absolutely no reason to doubt that there was any scope for fabrication because the FIR was filed by none other than the Inspector/PW1 himself and not only that the persons who were found at the scene were taken in custody, on suspicion, at the Police Station. The slight delay which is there in this case is certainly not sufficient to doubt the credibility or the evidence given by the Inspector/PW1, in support thereof. Mr. Bras De Sa has further submitted that there is a

contradiction in the evidence of Kasim/PW3 when he stated that it was the accused who had hired them to remove the metallic tank from the factory. It appears that the learned J.M.F.C. did not even apply her mind to find out whether he had made such contradictory statement. There is no material difference in the evidence of Kasim/PW3 as given in Court in relation to the statement recorded by the Police on 23-7-2002 wherein he had also stated that they were hired by the accused as "hamal" along with six other labourers, apart from the fact that the so-called contradiction was otherwise not proved, through the evidence of PSI Shetgaonkar/PW6. Mr. Bras De Sa has next submitted that Kasim/PW3 and Bhimrao/PW4 were arrested by the Police and therefore their statements could not have been recorded under Section 161 of the Code. In my view, this submission is also devoid of any merit in the light of what has been stated by PSI Shetgaonkar/PW6. PSI Shetgaonkar/PW6 stated that initially the labourers, including Kasim/PW3 and Bhimrao/PW4 were arrested by Head Constable Buckle No.1288 on suspicion under Section 41 of the Code and they were subsequently released under Section 169 of the Code and it is only thereafter that their statements were recorded on 23-7-2002 or thereabout.

12. The evidence of the Excise Inspector/PW1, Kasim/PW3 and Bhimrao/PW4 is reliable. There is no reason why the said witnesses should falsely implicate the accused. The Excise Inspector/PW1 stated that the accused came near him, near the factory and said that he was not involved in the commission of the offence and thereafter disappeared from the scene. This only shows that the accused was involved in the incident of the removal of the tank from bonded warehouse of the said factory. Kasim/PW3 clearly stated that they had removed the said metallic tank with the help of iron bar and pipe and they were about to remove the said tank outside the factory when the Excise Inspector reached there and the accused ran away. Likewise, Bhimrao/PW4 also stated that they removed the said metallic tank with the help of crow bar/parai and the iron pipe and in the process of removing the said tank, the Excise Inspector/PW1 reached the factory and then they stopped removing the tank outside the factory. The evidence of the Excise Inspector/PW1 when read along with the evidence of Kasim/PW3 and Krishna Lad/PW5 and the panchanama prepared shows that the said metallic tank was removed from the bonded warehouse inside the factory to the passage close to the door

and as stated by Kasim/PW3 was about to be removed outside the factory. In other words, the said metallic tank was moved from the bonded warehouse to the said passage at the instance of the accused by the labourers engaged by him including Kasim/PW3 and Bhimrao/PW4. The offence of theft consists in the dishonest taking of any movable property out of the possession of another without his dishonour when the person so taking the property intends to cause wrongful gain to himself or wrongful loss to the other. This intention is known as animus furandi and without it the offence of theft is not complete. The evidence of the Excise Inspector/PW1, already referred to clearly shows that the factory of which the accused was a Manager at the time of his taking over possession by the department of Excise on 30-6-2001 was in possession of the department of Excise. The accused has not even suggested whether he had continued to be the Manager of the said factory on the date of incident. It is also not the case of the accused that he had any key to enter the said factory and the evidence of the Excise Inspector/PW1 clearly shows that the keys of the factory were with their department after the said factory was sealed on 30-6-2001. The Order dated 11-10-2001 issued by the

Commissioner of Excise further confirms the said position. It is stated on behalf of the parties that the appeal filed against the said Order to the Chief Secretary is still pending. The accused had no right to enter the said factory nor the accused has claimed any such right. The prosecution evidence proves beyond reasonable doubt that the said factory was in possession of the department of Excise and the accused broke open the lock put by that department and entered the said factory with labourers and removed a metallic tank from the bonded warehouse and brought it to the passage near the entrance with a view to take away the same, although initially the prosecution had suspected that the accused might have entered the said factory over the roof. The evidence discussed herein above is cogent and reliable. The learned J.M.F.C. acquitted the accused on flimsy grounds. The said Order cannot be allowed to stand. The same is hereby set aside. The accused therefore is hereby held guilty under Sections 454, 380 r/w 511 I.P.C.

N. A. BRITTO, J.

DATE : 22ND SEPTEMBER,2006.

13. On being heard on the quantum of sentence, the accused has stated that he is presently 45 years of age, has a wife, two children and parents to look after and in case he is sentenced to imprisonment, his family will suffer. The accused has also stated that at present he is working with Saffron Resort at Calangute. The accused has submitted that this is the first case in which he is involved and therefore he be dealt with leniently.

14. On behalf of the prosecution, the learned Public Prosecutor Ms. W. Coutinho has left the matter as regards the sentence to the discretion of the Court. On behalf of the accused, the learned Counsel Mr. Arun Bras De Sa has submitted that considering that the accused is a first offender, the benefit of Section 3 of the Probation of Offenders Act, 1958(Act, for short) be extended to the accused. Mr. Bras De Sa has also submitted that the accused could be imposed some fine under Section 5 of the said Act which the accused would be willing to pay.

The submissions of the learned Counsel are unacceptable, considering the facts of the case. Mr. Bras De Sa has also submitted that the accused has suffered two days of imprisonment, one day when the accused was initially arrested and now when the accused has been arrested in connection with this appeal. The learned Counsel Mr. Bras De Sa has therefore submitted that the accused may not be sent to prison again.

15. Considering the nature of offences and the circumstances in which they were committed, I am inclined to take a lenient view. The accused is hereby sentenced under Section 454 I.P.C. to undergo two days S.I. and to pay a fine of Rs.2000/- in default to undergo S.I. for two months. The accused is sentenced under Section 380 r/w 311 I.P.C. to undergo two days S.I. and pay a fine of Rs.3000/- in default to undergo S.I. for three months. The sentence of imprisonment imposed on the accused shall be set off against the period of detention of two days undergone by the accused. In other words, the accused will not be required to undergo further imprisonment. The accused

shall pay the fine before the trial Court within a period of ten days. Bail Bonds executed before this Court stand cancelled.

N. A. BRITTO, J.

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